

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINAFILED
CHARLOTTE, NC

UNITED STATES OF AMERICA, the)	MAY 11 2011
States of CALIFORNIA,)	
DELAWARE, FLORIDA, HAWAII, ILLINOIS)	
INDIANA, MASSACHUSETTS, MINNESOTA)	
MONTANA, NEVADA, NEW HAMPSHIRE)	
NEW JERSEY, NEW MEXICO, NEW YORK)	
NORTH CAROLINA,)	
RHODE ISLAND, VIRGINIA,)	
the DISTRICT OF COLUMBIA,)	
the CITY of CHICAGO, and)	
the CITY of New York)	
)	
Plaintiffs,)	FILED UNDER SEAL pursuant to
<i>Ex rel.</i>)	31 U.S.C. § 3730(b)(2)
)	
LYNN E. SZYMONIAK,)	C.A. No. 3:10 cv 575
)	
Plaintiff-Relator,)	RELATOR'S MOTION
v.)	FOR LEAVE TO FILE
ACE SECURITIES CORPORATION)	SECOND AMENDED
ALLY FINANCIAL INC. f/k/a GMAC INC.)	<u>COMPLAINT</u>
AURORA LOAN SERVICES LLC)	
BANK OF AMERICA as successor-in-interest to)	
COUNTRYWIDE FINANCIAL CORPORATION)	
BAC HOME LOANS SERVICING, LLP)	
BANC OF AMERICA MORTGAGE SECURITIES, INC.)		
BAYVIEW LOAN SERVICING LLC)	
CALIFORNIA RECONVEYANCE COMPANY)	
CARRINGTON MORTGAGE SERVICES)	
CHASE HOME FINANCE)	
CITIMORTGAGE INC f/k/a CITI RESIDENTIAL)	
LENDING, INC. f/k/a)	
AMC MORTGAGE SERVICES INC)	
DOCX, LLC;)	
HOMEQ SERVICING CORPORATION d/b/a)	
BARCLAYS CAPITAL REAL ESTATE, INC.)	
HSBC MORTGAGE SERVICES INC.)	
LENDER PROCESSING SERVICES, INC.;)	
LITTON LOAN SERVICING)	
NATIONWIDE TITLE CLEARING)	
OCWEN LOAN SERVICING)	
ONEWEST BANK)	
ORION FINANCIAL GROUP)	

PROMMIS SOLUTIONS)
SECURITIES CONNECTION, INC.)
SELECT PORTFOLIO SERVICES, INC.)
VERICREST FINANCIAL INC.)
WELLS FARGO HOME MORTGAGE d/b/a)
AMERICA'S SERVICING COMPANY)
JOHN DOES CORPORATIONS 1 THROUGH 100)
All whose true names are unknown)
Defendants.)

)
)

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Attorneys for Relator Lynn E. Szymoniak

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, Relator Lynn E. Szymoniak respectfully moves for leave to file a second amended complaint.¹ In support of said motion, Relator states as follows:

1. This is a qui tam action filed pursuant to the federal False Claims Act and the false claims acts of the states and municipalities listed in the caption. The case is based on damages suffered by the United States and the aforementioned states and municipalities as a result of false statements and false claims made by the defendants in connection with the alleged assignment and transfer of notes and mortgages relating to residential real estate transactions. As alleged in the complaint, defendants purported to possess and own such notes and mortgages when they did not actually have such possession and ownership, and then when called upon to produce such notes and mortgage assignments created fraudulent documentation instead.

2. The case was commenced with the filing under seal of the original complaint on or about November 12, 2010. Relator thereafter filed under seal a first amended complaint. Thereafter, this Court ordered that the seal be partially lifted so as to permit limited disclosure of portions of the first amended complaint to the defendants. The Government is in the process of making such disclosure to the defendants.

3. Relator now moves to file a second amended complaint, which contains relatively few changes from the amended complaint. The factual allegations as to the underlying absence of notes and mortgage assignments and the fabrication of such documents by defendants remain the same. The purpose of the proposed amendment is to provide greater specificity with respect to the scope and nature of the damages suffered by the United States as a result of defendants' alleged conduct. Particularly in light of the fact that the complaint has been partially unsealed

¹ A copy of the proposed second amended complaint, blacklined to show the changes from the first amended complaint, is annexed to the Declaration of William K. Diehl, Jr., submitted herewith.

and is being provided to defendants, Relator submits that in fairness to the defendants, they should be provided additional clarity and specificity with respect to the scope and nature of the damages that, it is alleged, their conduct has caused to the United States.²

4. The Fourth Circuit has “repeatedly held that leave to amend under Fed. R. Civ. P. 15(a) “shall be freely given when justice so requires” and that ‘[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits,’ and that ‘[i]n the absence of any apparent or declared reason such as undue delay, bad faith or dilatory motive … the leave … should’ be ‘freely given.’” *Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 279 (4th Cir. 1987) (citing *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1059 (4th Cir. 1982), and *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986)); see *Foman v. Davis*, 371 U.S. 178, 182 (1962). In exercising its discretion to grant or deny leave to amend, the Court should focus “on prejudice or futility or bad faith as the only legitimate concerns in denying leave to amend, since only these truly relate to protection of the judicial system or other litigants.” *Davis v. Piper Aircraft Co.*, 615 F.2d 606, 613 (4th Cir. 1980). “Leave should be freely given to allow amendment for the purpose of presenting the real issues of the case, where the moving party has not exercised bad faith and is not acting to delay the disposition of the case, where the opposing party would not be prejudiced, and when unnecessary delay will not result if the motion to amend is granted.” *Medoil Corp. v. Clark*, 753 F. Supp. 592, 596 (W.D.N.C. 1990).

5. In particular, courts routinely grant leave to amend where, as here, the purpose of the amendment is to provide “a more particular pleading of the damages plaintiff incurred as a

² The only other substantive change in the proposed second amended complaint is that the State of Oklahoma is deleted as a plaintiff, because it appears that its false claims statute is narrow and would not cover the conduct alleged in this case.

result of defendants' actions." *General Security, Inc. v. APX Alarm Security Solutions, Inc.*, 647 F. Supp. 2d 207, 212 (N.D.N.Y. 2009); *see Heinhold Commodities, Inc. v. N.Y. Mercantile Exchange*, 78 F.R.D. 190, 192 (S.D.N.Y. 1978) ("Plaintiff may amend its complaint to change its theory of recovery ... or to seek additional damages"); *cf. Medoil*, 753 F. Supp. at 596 ("The clearest cases for leave to amend are correction of an insufficient claim or defense and *clarification of previously alleged claims*") (emphasis added).

6. There is no conceivable prejudice or bad faith involved in this proposed amendment. The amendment merely describes in greater detail the nature of the damages suffered by the United States as a result of defendants' alleged conduct. It does not change the allegations relating to the underlying conduct itself. Given that the case is in its very early stages – indeed, there really have not been any proceedings at all involving the defendants – defendants will not be prejudiced by the amendment. To the contrary, the amendment provides defendants with greater information regarding the damages to which they are exposed.

WHEREFORE, Relator respectfully requests that her motion for leave to file a second amended complaint be granted.

Dated: May 11, 2011

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CERTIFICATE OF SERVICE

On May 11, 2011, I hereby certify that a copy of the Relator's Motion for Leave to file Second Amended Complaint, Filed Under Seal (file stamped) will be served promptly on the persons listed below after Relator's Counsel receives a file-stamped copy of such document from the Clerk's Office and in accordance with the Federal False Claims Act, the State False Claims Acts, and Fed R. Civ. P. 4.



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